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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1965

1306

ROY MANNIS, A MINOR, BY HIS PARENTS,
FLOYD R. MANNIS, ET UX. ..... *Petitioner,*

v.

STATE OF ARKANSAS EX REL.
DEWITT SCHOOL DIST. No. 1 ..... *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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PARAGON PRINTING CO., LITTLE ROCK

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Constitutional provision involved	2
State statute involved	3
State regulation involved	3
Statement	5
How the federal question is presented	7
Reasons for granting the writ	9
Conclusion	15
Appendix A — Opinion of Supreme Court of Arkansas	16
Appendix B — Opinion of trial court	20

Citations

Cases:

Brinkerhoff-Farris Trust Co. *v.* Hill, 281 U.S. 673, 677-8	15
Coe *v.* Armour Fertilizer Works, 237 U.S. 413	13
Cole *v.* Arkansas, 333 U.S. 196	13
Cude *v.* State, 237 Ark. 927, 377 S.W. 2d 816	10
Dickson *v.* Yates, 194 Iowa 910, 188 N.W. 948	11
Dunn *v.* United States, 284 U.S. 390	11
Garland *v.* Davis, 4 How. 131	11
Herndon *v.* Georgia, 295 U.S. 441	15
Hovey *v.* Elliott, 167 U.S. 409	12
Jobe *v.* Urquhart, 102 Ark. 470, 143 S.W. 121	11
Ryerson *v.* United States, 312 U.S. 405	11
Texarkana *v.* Brachfield, 207 Ark. 774, 183 S.W. 2d 304	12
Turpin *v.* Lemon, 187 U.S. 51	13
United States *v.* La Franca, 282 U.S. 568	11
Virginian R. Co. *v.* Mullens, 271 U.S. 220	12
Wright *v.* DeWitt School District No. 1, 238 Ark. 906, 385 S.W. 2d 644	10

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The petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Arkansas entered in this matter January 10, 1966.

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of Arkansas (R. 292-295) is reported in 240 Ark. 40, 398 S.W. 2d 206, and is printed in Appendix A hereto, *infra.* The opinion of the trial court (R.11-25) is unreported; it is printed in Appendix B hereto, *infra.*

JURISDICTION

The judgment of the Supreme Court of Arkansas was entered January 10, 1966 (R.296). It affirmed a

final order of the Probate Court of Arkansas County, Arkansas, Southern District, which was entered March 1, 1965 (R.26-30). Rehearing was denied February 14, 1966 (R.299). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3) since this matter involves rights claimed under the Constitution of the United States.

QUESTION PRESENTED

Whether the Supreme Court of Arkansas did not deprive the petitioner of his rights under the Due Process Clause of the Fourteenth Amendment by affirming a final order of the trial court substantially infringing upon his liberty on a theory not within the issues before the trial court nor fairly to be expected as a ratio decidendi on appeal with the result that defenses which might have been available to the petitioner were foreclosed without hearing or any reasonable opportunity for hearing thereon.

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment
to the Constitution of the United States
Section 1

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATE STATUTE INVOLVED

Act 169, Arkansas Acts of 1931,
Section 150 [Ark. Stats. (1947)
Anno. Section 80-1502 (Repl. 1960)]

"Every parent, guardian, or other person residing within the State of Arkansas and having in custody or charge any child or children between the ages of seven and fifteen, (both inclusive) shall send such child or children to a public, private, or parochial school under such penalty for noncompliance with this section as hereinafter provided."

STATE REGULATION INVOLVED

Rule 21 of the Rules and Regulations
Pertaining to Communicable Diseases
of the Arkansas State Board of Health, 1960 Revision

"No person shall be entered as a teacher, employee, or pupil in a public or private school in this State without having first presented to the principal in charge or the proper authorities, a certificate from a licensed and competent physician of this State certifying that said teacher, employee, or pupil has been successfully vaccinated; or, in lieu of a certificate of successful vaccination, a certificate certifying a recent vaccination done in a proper manner by a competent physician; or a certificate showing immunity from having had smallpox.

THE RESPONSIBILITY FOR THE ENFORCEMENT OF THIS REGULATION RESTS EQUALLY ON EACH AND EVERY MEMBER OF THE SCHOOL BOARD, THE SUPERINTENDENT, PRINCIPAL, OR

TEACHER IN CHARGE, AND THE PARENT OR GUARDIAN OF THE PUPIL, AND EACH OF THEM SHALL BE SEPARATELY AND INDIVIDUALLY LIABLE FOR PERMITTING ANY VIOLATION OF THIS REGULATION. IF, IN THE DISCRETION OF THE HEALTH AUTHORITY HAVING JURISDICTION, ANY PERSON TO WHOM THIS REGULATION APPLIES SHALL HAVE PHYSICAL DISABILITY WHICH MAY CONTRAINDICATE VACCINATION, A CERTIFICATE TO THAT EFFECT, ISSUED BY THE SAID HEALTH OFFICER, STATING THE CONTRAINDICATION, MAY BE ACCEPTED IN LIEU OF A CERTIFICATE OF VACCINATION, PROVIDED THAT THE EXEMPTION SHALL NOT APPLY WHEN SUCH DISABILITY SHALL HAVE BEEN REMOVED.

The school boards, school superintendents, school teachers, parents, and guardians shall be equally responsible for the enforcement of the compulsory vaccination law. They shall furnish such information to the health authorities from time to time as may be required.

STATEMENT

On December 22, 1964, a petition was filed by the Prosecuting Attorney of the Seventeenth Judicial Circuit of the State of Arkansas, of which the Southern District of Arkansas County is a part, on the relation of DeWitt School Dist. No. 1, within the jurisdictional area concerned, against Roy Mannis, a child between the ages of seven and fifteen, in which it was alleged that the child was a "neglected child" as that term is defined by Arkansas law in that the child was not attending a "public or private accredited school" by reason of the facts that the child's parents had refused to have the child vaccinated against smallpox and that the appropriate public school authorities had refused to admit him to school for such reason and that, therefore, the child's education was being neglected. The prayer of the petition was that a guardian of the person of the child be appointed with authority to take custody of the child, to have him vaccinated and thereupon to enroll him in a "public" or "other accredited school" (R.3-5).

By stipulation, the proceeding was made applicable to twenty other children similarly situated (R.4, 40-41).

In the response to the petition it was denied that the child was neglected and it was alleged that to require him to be vaccinated would be violative of freedom of religion (R.8-9).

The case was tried on the issues so joined on January 28 and 29, 1965 (R.1). The evidence was that Roy Mannis had been refused admission to the public school system because he had not been vaccinated against smallpox (R.43-50), but, during the time in question, had been

attending a parochial school of the General Assembly and Church of the First Born (R.230 et seq.). He had not been vaccinated because vaccination is contrary to the religious tenets of the General Assembly and Church of the First Born, of which he is a member (R.258-266). At an early stage in the trial, the trial court ruled from the bench as follows:

> " . . . the allegation of neglect is based on this single narrow issue of the failure of the parents to send the child to a 'public or private accredited school' and no other allegation of neglect that appears in the pleading, and the Court will certainly not consider there is any other, or presume that there is any other area of neglect on the part of the parents toward the child . . . " (R.105-106).

The entire trial, therefore, being limited to the issue so stated, concerned the question whether the child was receiving a reasonable education in the parochial school which he was attending.

At the conclusion of the trial, the court delivered an oral opinion to the effect that the child was not receiving a reasonable education, and that, therefore, a guardian should be appointed to have the child vaccinated and enrolled in a school wherein he might receive a reasonable education (R.11-25). However, the trial court ruled that the order should remain in abeyance pending review by the Supreme Court of Arkansas (R.25). On March 1, 1965, the final order (R.26-30) was entered wherein it was specifically found "that Roy Mannis is prohibited by school officials from attending the public schools of DeWitt, Arkansas, for the reason that his natural parents will not consent to his vaccination or immunization against the disease smallpox; that Roy Mannis is not receiving

a reasonable education in the church school which he is now attending and thereby is a neglected child; . . ." (R.27).

On appeal, the parties proceeded on the theory of the trial court that the question for decision was whether the child was neglected by virtue of any defect in the education he was receiving (See briefs attached to record, especially Brief of Mannis, pp. 53-66, and Brief of DeWitt School Dist. No. 1, pp. 3-9).

How the Federal Question is Presented

To the surprise of this petitioner, the Supreme Court of Arkansas, in affirming the final order of the trial court, abandoned this theory.

In its opinion, the Supreme Court of Arkansas held:

> "It is clear that the law [Ark. Stat. Ann. Sec. 80-1502 (Repl. 1960)] requires that the children attend school, and a valid regulation [Health Board Regulation No. 21, 1960 Revision] requires that they be vaccinated" • • • Therefore, a child attending school in non-compliance with this health regulation is doing so in violation of the law. This fact alone is sufficient evidence upon which to base a finding of neglect. Furthermore, the *refusal of parents* to permit vaccination as a prerequisite to school attendance is sufficient evidence upon which to base a finding of neglect. • • • The probate court was correct in appointing a guardian for [the child] for the purpose of having him vaccinated as a prerequisite to attending school. • • •

> "The probate court found that the parochial school was not affording the appellant a reasonabl lucation. We deem it unnecessary to determine the reasonableness of the educational facilities. In our view it is sufficient to base this opinion primarily upon the issue that vaccination against smallpox is a valid prerequisite to appellant's attendance at any school" (R.294-295). 240 Ark. 40, at 42, 43, 398 S.W. 2d 206, at 207, 208.

By comparison the trial court, in its opinion, held:

> "So, the Court is of the opinion that if the children involved in this litigation who have never been vaccinated and who are between the ages of seven and fifteen, inclusive — if they should be receiving a reasonable education in any public, private or parochial school as that term is used in the compulsory attendance law of the State of Arkansas — that this Court could not make a finding that the children were neglected as that term is used in the laws of Arkansas. If this contingency should occur, it may well be that someone would be violating the criminal laws of the state, but this in itself may not constitute neglect. So, in the final analysis, the question before this Court is whether Roy Mannis and the other children whose names appear in the petition are receiving a reasonable education in a public, private or parochial school" (R.17-18).

In view of the foregoing situation the petitioner, at the first opportunity, viz., in his petition for rehearing (R. 297-298) in the Supreme Court of Arkansas raised the question presented herein for review. That this federal question was actually considered and decided by

the Supreme Court of Arkansas on rehearing is shown by that court's certificate to such effect (R.300).

Reasons for Granting the Writ

The state regulation involved, Rule 21 of the Arkansas State Board of Health (1960 Revision), in express terms exempts from the requirement of vaccination against smallpox any person who has a physical disability which may contraindicate vaccination. Moreover, the regulation in express terms is inapplicable to any person who is immune from having had smallpox. For all that appears, the child Roy Mannis (and the other twenty children similarly situated) might be allergic in lethal degree to smallpox vaccine or might be totally immune from smallpox as contemplated by the regulation, and, therefore, absolutely exempt from vaccination. But, since the theory of the case pursued in the trial court was strictly limited to the matter of whether the child was receiving a reasonable education, any defense based on a possible exemption as indicated would have been completely immaterial and thus inadmissible at trial. It is obvious, in the light of the entire record, that the parties, as well as the trial court, understood that they were litigating their rights exclusively with reference to the Arkansas compulsory school attendance law, Ark. Stats. (1947) Anno. Section 80-1502 (Repl. 1960), and that the regulation concerning vaccination was only incidental, or, as it may be said, lurking in the background, but having no role in the action.

Nothing in the trial of the case or in previous decisions of the Supreme Court of Arkansas foreshadowed the theory fixed upon by such court in its decision.

Two prior Arkansas decisions having some relation to the case at bar, and referred to throughout the opinions of both the trial court and the Supreme Court of Arkansas, are *Wright* v. *DeWitt School District No. 1,* 238 Ark. 906, 385 S.W. 2d 644, and *Cude* v. *State,* 237 Ark. 927, 377 S.W. 2d 816.

In the *Wright* case, *supra,* it was simply held that Rule 21 of the Arkansas State Board of Health (1960 Revision), the regulation involved here, is not violative of the constitutional guaranty of freedom of religion. In the *Cude* case, *supra,* it was held that children, who were not attending any school and were not receiving any education because the parents refused on religious grounds to comply with Rule 21, *supra,* might be temporarily taken from their parents in guardianship proceedings so that they could be vaccinated to facilitate admission to school. It is extremely significant that the Supreme Court of Arkansas, in the Cude case, in unambiguous language, pursued the same theory as the trial court in this case, for it was pointed out:

> "Appellants argue that Archie Cude has been fined on three occasions for not sending the children to school, and that the State has no other remedy. This action was not instituted for the purpose of punishing Cude, but to enable the children to obtain a reasonable education." *Cude* v. *State*, 237 Ark. 927 at 936, 377 S.W. 2d 816, at 821.

It is apparent that both parties and the trial court depended upon the law as propounded in the Cude case, which, by the way was decided April 6, 1964, less than a year before the instant proceeding was instituted in the trial court, viz., December 22, 1964 (R.3). Furthermore, it is manifest, upon the whole record, that there was substantial evidence that Roy Mannis (also the other

children similarly situated) was in fact receiving a reasonable education. The evidence to this effect was, it is suggested, sufficiently strong to give the Supreme Court of Arkansas misgivings as to the soundness of the trial court's fact findings in this regard — misgivings which could have been a factor in motivating the Supreme Court of Arkansas to rest its decision on a different theory, as it did. Be this as it may, the result was that this petitioner has, through no dereliction of his own, been denied the right to be heard on defenses which he might have presented if he had been apprised of the possible turn of events in the appellate stage of the litigation.

It is not perceived that this is a case falling within the rule that an appellate court, here the Supreme Court of Arkansas, is not limited to the points relied on but may give judgment on the whole record. See *Garland* v. *Davis,* 4 How. 131.

Nor does this case appear to fit the rule that, if a judgment is right for any reason, it is the duty of the reviewing court to affirm it. See *Ryerson* v. *United States,* 312 U.S. 405. Rather, it is believed, this case is one governed by the well established rule that the theory on which a case was tried in the court below must be strictly adhered to on appeal, see *Dunn* v. *United States,* 284 U.S. 390; *United States* v. *La Franca,* 282 U.S. 568 *Jobe* v. *Urquhart,* 102 Ark. 470, 143 S.W. 121, and that the theory on which the case was tried will be treated as the law of the case on appeal. See *Dickson* v. *Yates,* 194 Iowa 910, 188 N.W. 948. Also, it is not seen how this case could be subject to the exception that where the newly advanced theory involves only a question of law arising on the proved facts and where the same result would necessarily be reached on a new trial, if granted,

the judgment may nevertheless be affirmed on the new theory.

It is, of course, appreciated that this doctrine is stated by the authorities in terms denoting bindingness on the parties to the litigation, as, for example, *Virginian R. Co.* v. *Mullens,* 271 U.S. 220, wherein it was held that a plaintiff cannot, on appeal, change to a theory of liability which, because of the pleadings and method of trial, the defendant was not called upon to meet in the trial court. But, by what logic can it be asserted that the doctrine does not, a fortiori, bind the appellate court?

If a case were tried on a contract theory, to which a six-year statute of limitations applied, and the plaintiff had recovered judgment; then on appeal the judgment should be affirmed on a tort theory, to which a three year statute of limitations applied, it is pretty plain that the affirmance would be violative of due process of law if it appeared that four years had run on the cause of action before suit was brought, for the tort statute of limitations would have been immaterial and not available to the defendant at trial. Thus, the defendant would be deprived of the right to plead and prove a complete defense to liability.

The principle involved here is no different. It has to do with the right to a hearing, a right which the Supreme Court of Arkansas has said is " . . . a sacred right, for which governments are established and maintained in democracies." *Texarkana* v. *Brachfield,* 207 Ark. 774, 183 S.W. 2d 304.

The maxim of the common law is that "no man should be punished without an opportunity of being heard." *Hovey* v. *Elliott,* 167 U.S. 409. Beyond this, an

apportunity for a hearing is an essential ingredient of due process of law. *Turpin* v. *Lemon*, 187 U.S. 51. This element of due process is of such importance that one is not barred from complaining of a denial of an opportunity for hearing even though, in his particular case, due process would lead to the same result because he had no adequate defense on the merits. *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413.

Thus, in the case now before the Court, although it is granted that there is nothing in the record to show whether or not the child (or the twenty other children similarly situated) may or may not come within an exception to the regulation concerning vaccination, the fact is not germane to the question of due process. *Coe* v. *Armour Fertilizer Works, supra.* Indeed, it it difficult to see, in the light of the circumstances and the rules of procedure, how that fact could have been made a part of the record.

This Court has at least once before dealt with a situation indistinguishable in essence from the case at hand. In *Cole* v. *Arkansas*, 333 U.S. 196, the petitioners were convicted of violating a section of a statute making it an offense to promote an unlawful assemblage. They appealed the conviction on due process grounds. The Supreme Court of Arkansas affirmed on the basis that the petitioners had violated another section of the same statute which proscribed the use of force and violence. This Court unanimously reversed, holding: "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." Due process entitled the petitioners "to

have the validity of their conviction appraised on a consideration of the case as it was tried and as the issues were determined in the trial court."

So, it is, that the petitioner (with the twenty other children concerned) was entitled to have the final order of the trial court affecting his liberty appraised by the Supreme Court of Arkansas on a consideration of the case as it was tried and as the issues were determined in the trial court.

CONCLUSION

Since the decision of the Supreme Court of Arkansas was based on a theory different from that pursued in the trial court, a shift that could not reasonably have been anticipated, see *Herndon* v. *Georgia,* 295 U.S. 441, so that the petitioner had no occasion prior to rehearing to assert the federal question as to which review is sought, see *Brinkerhoff-Faris Trust Co.* v *Hill,* 281 U.S. 673, 677-8; since the Supreme Court of Arkansas did in fact consider this federal question and decide it adversely to the petitioner on rehearing (R.300); and since thereby the Supreme Court of Arkansas deprived the petitioner of the right to a full hearing in violation of due process, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

MANNIS v. STATE, EX REL. DEWITT SCHOOL DIST.
5-3682

Opinion delivered January 10, 1966.

Appeal from Arkansas Probate Court, Southern District; *Lawrence E. Dawson, Jr.*, Judge; affirmed.

James L. Sloan, for appellant.

Bruce Bennett, Attorney General, By: *Fletcher Jackson*, Asst. Attorney General, for appellee.

FRANK HOLT, Associate Justice. The issue in this case is the right of appellant to attend a parochial school without being vaccinated against smallpox and, further, whether the school is affording appellant a reasonable education.

The appellee, by the prosecuting attorney and the County school supervisor, filed a petition in the probate court alleging that appellant Roy Mannis, the ten-year-old child of Mr. and Mrs. Floyd R. Mannis, is a neglected child "in that said child is not attending a public or private accredited school by reason of the fact that said child's parents refuse to have said child immunized or vaccinated against the disease of smallpox"; that because of not being vaccinated the appellant's education is being neglected and, therefore, a temporary guardian should be appointed by the court for the purpose of having the appellant vaccinated and enrolled in the public schools of DeWitt or some accredited school.

The appellant denied the allegations in the petition except the fact that he had never been vaccinated against smallpox and asserted that to require vaccination would be an invasion of his constitutional rights. The probate court found the issues in favor of appellee and appointed a temporary guardian for the appellant for the purpose of having him vaccinated and then enrolled in "a public, private, or parochial school where said child will receive a reasonable education." From this order appellant brings this appeal.

For reversal appellant asserts that he "may not be taken from his parents and forcibly vaccinated against his wishes when such is against his religious belief and practice and the religious belief and practice of his parents and, therefore, in violation of their rights under the Constitution of the United States."

The appellant and his parents are members of The General Assembly and Church Of The First Born, a religious body whose members believe that vaccination is against the Will of God. The sincerity of their views is not questioned. Appellant and other children named in the petition were refused admittance to the public schools operated by the appellee because they had not been vaccnated against smallpox. Thereupon, the Church organized and conducted a parochial school which does not require vaccination as a condition for entrance or attendance. Appellant attends this school.

The case at bar is a sequal to *Wright* v. *DeWitt School District No. 1,* 238 Ark. 906, 385 S.W. 2d 644. There certain members of this same Church unsuccessfully sought to enjoin the local school district [appellee in the case at bar] from enforcing this same State health regulation requiring the vaccination of all school children

against smallpox. There it was argued that such a requirement contravened their religious beliefs and constitutional rights. We reaffirmed our decision in *Cude* v. *State*, 237 Ark. 927, 377 S.W. 2d 816, that the questioned health regulation is enforceable as a reasonable and valid exercise of the police power of the State. In the *Cude case* we said: "It is clear that the law [Ark. Stat. Ann. § 80-1502 (Repl. 1960)] requires that the children attend school, and a valid regulation [Health Board Regulation No. 21, 1960 Revision] requires that they be vaccinated." This health regulation has the force and effect of law. Ark. Stat. Ann. §§ 82-109 — 110 (Repl. 1960); *Wright* v. *DeWitt School District, supra.* Therefore, a child attending school in non-compliance with this health regulation is doing so in violation of the law. This fact alone is sufficient evidence upon which to base a finding of neglect. Furthermore, the *refusal of parents* to permit vaccination as a prerequisite to school attendance is sufficient evidence upon which to base a finding of neglect. *Cude* v. *State, supra.* The probate court was correct in appointing a guardian for appellant for the purpose of having him vaccinated as a prerequisite to attending school.

Our statute requires that children between the ages of 7 and 15 inclusive must attend "a public, private or parochial school." Ark. Stat. Ann. § 82-1502. Appellant asserts that since he is complying with this statute by attending a parochial school the vaccination requirement is not applicable because the State Health Regulation applies only to children attending a "public or private school." We are of the view that a parochial school is also a private school within the meaning of this health regulation since it is managed and supported by a private organization. 78 C. J. S., Schools and School Districts § 1,p.607.

Nor can it be contended by the appellant that the probate court was without jurisdiction in the case at bar. This issue was determined adversely to appellant in *Cude* v. *State, supra.* There we said: "The issue of whether the three children of appellant were neglected was before the probate court in the proceeding for the appointment of a guardian and the court had jurisdiction to determine that fact."

The probate court found that the parochial school was not affording the appellant a reasonable education. We deem it unnecessary to determine the reasonableness of the educational facilities. In our view it is sufficient to base this opinion primarily upon the issue that vaccination against smallpox is a valid prerequisite to appellant's attendance at any school.

Affirmed.

JUSTICE JOHNSON dissents.

JIM JOHNSON, Associate Justice (dissents). In *Cude* v. *State,* 237 Ark. 927, 377 S.W. 2d 816, I dissented. My views are expressed there in detail. The spectre foretold there has indeed appeared here. For the reasons so stated, I respectfully dissent in the case at bar.

APPENDIX B

IN THE PROBATE COURT OF ARKANSAS COUNTY, ARKANSAS
SOUTHREN DISTRICT — SECOND DIVISION

IN THE MATTER OF THE GUARDIANSHIP OF ROY MANNIS,
A MINOR
Case No. 1780

Opinion of the Court Orally Rendered in Open Court
January 29, 1965

Under date of December 22, 1964, a petition was filed in the Probate Court of Arkansas County Southern District of Arkansas by the Prosecuting Attorney of the 17th Judicial District, W. M. Lee, and by Joe Frank Chambers, a resident of the Southern District of Arkansas County, Arkansas, and the County School Supervisor for Arkansas County.

The petition prays for an order of this Court that Mrs. Edna Wheeler, Probation Officer for Arkansas County, be appointed temporary guardian of the person of Roy Mannis "for the specific purpose of having said child properly vaccinated and immunized against the disease of smallpox and thereafter enrolled in the public schools of this state or in some accredited private school if the legal parents of said child so desire . . . " No question has been raised by the respondents to the standing of the petitioners to file this petition, nor has there been any question raised that the individual named in the petition to serve as the temporary guardian is not a reputable citizen of Arkansas County, Arkansas. There has been actually no testimony concerning Mrs. Wheeler, but the Court, in the absence of any testimony to the contrary,

will indulge the presumption that she is a reputable citizen of Arkansas County and would be qualified to serve as temporary guardian of this minor, assuming that the Court can and should make certain findings and that the Court should, as a matter of law, based upon the facts, appoint a guardian for the minor.

This petition is resisted, not only by the parents of the particular minor involved but also by other members of the denomination or church known as the General Assembly and Church of the First Born, and by stipulation it is agreed and stipulated that the children and the parents named in the petition, where there is no specific request made for a guardian to be appointed for those other children, they will be bound by any findings of this Court and likewise the findings of this Court will be binding on Mr. Lee and Mr. Chambers, and in view of this stipulation, a multiplicity of suits is prevented.

The Court will make this finding, that is, that the respondents in this case and other members of the church or denomination of this community known as the General Assembly and Church of the First Born, are completely sincere concerning their religious belief. That, in itself, is a trait or quality that this country could use more of. The Court makes that finding in view of the fact that there may be some question in the Cude case as to how far Mr. Cude's sincere religious beliefs went. The Supreme Court decision does not make any particular finding on that question. Mr. Cude, and probably his wife, did raise the constitutional question concerning their religious beliefs, but according to the opinion of the Supreme Court, Mr. and Mrs. Cude, unlike the respondents and other members of this church, had no particular church or denomination to which they owed their allegiance.

The Court would not say and would not make a finding that an individual or individuals could not have certain religious beliefs outside of an organized church. It may very well be that a person or persons would have sincere, honest, religious beliefs and not be associated with any organized church as we know that term or terms to be used. The facts are, however, that Mr. and Mrs. Cude did not belong to any organized church or denomination and these people do, and the testimony shows that it has been a denomination in existence for some time and is not just a local denomination, but actually there are churches organized in other states, according to testimony of Mr. Mannis. The Court makes that finding because the Court is convinced that these respondents and the other members of this General Assembly and Church of the First Born are sincere in their beliefs. There is no evidence of bad character on the part of the respondents. The Court believes that they are people of good morals; that they are honest and hardworking, and that they have been guilty of no acts at all of neglect, with the exception of the question now before the Court. These are the issues to be decided in this case.

This Court has as its guide two fairly recent cases decided by the Supreme Court of Arkansas, and this Court, as stated in a ruling by the Court yesterday, is bound by the rulings of the Supreme Court of Arkansas. It would make no difference at all as to what this Court should think about the facts and the law here as to whether Mr. and Mrs. Mannis are neglecting their son, Roy, assuming that this Court's opinion was contrary to the findings in the Cude case. This Court is bound by, not only the Cude case, but by the later case of *Wright* v. *DeWitt School District No. 1 of Arkansas County,* a case that involves some of the same individuals that are

involved in this case. The *Wright* case was decided January 11, 1965, and the *Cude* v. *State* case was decided April 6, 1964. The *Cude* case did involve to some extent the same procedural point that is involved in this case, and, that is, a petition had been filed by the Prosecuting Attorney of the 9th Judicial District, Ben Core, to have a guardian appointed for the three Cude children who were not attending school, and in Mr. Core's petition he asked that the custody of the children be placed with the Child Welfare Division of the State Welfare Department. In this case the petitioners ask the Court to appoint Mrs. Edna Wheeler, the Probation Officer of Arkansas County. That difference does not affect the procedural aspect of the case in view of the fact that the Court can appoint any reputable citizen as guardian if it finds that a guardian should be appointed.

The Trial Court found that, in the Cude case, a guardian should be appointed for the Cude children and there was also some litigation in the Chancery Court of the same county, and those two cases were consolidated for appeal to the Supreme Court of Arkansas. In construing the Cude case and the later case of *Wright* v. *DeWitt School District No. 1,* the Court is of the opinion that the reason for the appointment of a guardian in the Cude case was because of the fact that the Cudes were not providing an education for their children. The language of the Cude case on Page 936 reads, "The issue of whether the three children of appellants were neglected was before the probate court in the proceeding for the appointment of a guardian, and the court had jurisdiction to determine that fact. The evidence that the parents would not permit vaccination and thereby enable the children to attend school is sufficient to base a finding of neglect."

The two subjects, and that is the vaccination and the attendance in school, are related and tie in together but it may be well to refer to the regulation that the Supreme Court has held is a valid regulation and also to refer to the compulsory attendance law of the State of Arkansas, both of which were referred to in the Cude case, and the Court will simply quote from the Cude case wherein the Court set forth that health regulation and that compulsory attendance law. "There is no question that the laws of this State require parents to send to school their children between the ages of seven and fifteen, inclusive. Ark. Stat. Ann. Sec. 80-1502 (Repl. 1960) provided: 'Every parent, guardian, or other person residing within the State of Arkansas and having in custody or charge any child or children between the ages of seven and fifteen, both inclusive, shall send such child or children to a public, private, or parochial school under such penalty for non-compliance with this section as hereinafter provided.'" It is to be observed that the ages in Arkansas for compulsory attendance in school are between the ages of seven and fifteen, inclusive.

Now then, quoting from the Cude case further. "The school administrative authorities of the State of Arkansas have adopted a regulation requiring vaccination as follows: 'No person shall be entered as a teacher, employee or pupil in a public or private school in this state without having first presented to the principal in charge or the proper authorities, a certificate from a licensed and competent physician of this state certifying that the said teacher, employee or pupil has been successfully vaccinated; or in lieu of a certificate of successful vaccination, a certificate certifying a recent vaccination done in a proper manner by a competent physician; or a certificate showing immunity from having had smallpox . . .' There are several cases cited.

It is the opinion of this Court that the health regulation was promulgated by the State Health Department, rather than by the school administrative authorities. The school administrative authorities are supposed to comply with the health regulation, but the regulation itself was promulgated by the State Health Department, and it is the opinion of this Court that it had for its purpose the vaccination of school-age children, and actually it does cover and is broader than the compulsory attendance law in that it does cover any child who attends or plans or is wanting to attend a public or private school. The health regulation, it is to be observed, would include a child six years of age or possibly a child sixteen or seventeen or eighteen years of age whereas the compulsory attendance law is narrowed to the ages of seven and fifteen, but the two are related to some extent and that is that parents are under a duty to send their children between the ages seven and fifteen to a public or private or parochial school and also, by virtue of this health regulation, must consent and be willing to have their children vaccinated against smallpox.

It is the opinion of the Court that the health regulation had for its purpose the community interest primarily, rather than the individual interest. If it was the intention of the regulation that every minor be vaccinated against smallpox, the health regulation would so provide, and it does not so provide that all minors in the state be vaccinated. It simply provides they cannot attend a public, private or parochial school unless they are vaccinated and then you do have the requirement of those between the ages of seven and fifteen who must attend.

So, the Court is of the opinion that if the children involved in this litigation who have never been vacci-

nated and who are between the ages of seven and fifteen, inclusive — if they should be receiving a reasonable education in any public, private or parochial school as that term is used in the compulsory attendance law of the State of Arkansas — that this Court could not make a finding that the children were neglected as that term is used in the laws of Arkansas. If this contigency should occur, it may very well be that someone would be violating the criminal laws of the state, but this in itself may not constitute neglect. So, in the final analysis, the question before this Court is whether Roy Mannis and the other children whose names appear in the petition are receiving a reasonable education in a public, private or parochial school.

To bear out this holding of the Court that this was the essence of the decision in the case of *Cude* v. *State*, the Court quotes once again from that decision. It is in the record several times, but it should be made a part of the Court's opinion in this case. "The issue of whether the three children of appellants were neglected was before the probate court in the proceeding for the appointment of a guardian, and the court had jurisdiction to determine that fact. The evidence that the parents would not permit vaccination and thereby enable the children to attend school is sufficient to base a finding of neglect." Citing cases: "In Re Marsh, 14 A. 2d 386; *Morrison* v. *State*, 252 S.W. 2d 97; *Santos* v. *Goldstein*, 227 N. Y. Supp. 2d 451."

"Appellants argue that Archie Cude has been fined on three occasions for not sending the children to school, and that the State has no other remedy. This action was not instituted for the purpose of punishing Cude, ***but to enable the children to obtain a reasonable education.***" (Emphasis added.)

So, as previously stated, the question before the Court as to whether these children are being neglected, specifically to whether Roy Mannis is being neglected, is whether he is and has been in attendance at a public, private or parochial school that is affording to him and will continue to afford to him a reasonable education. That is a factual question that the Court must and does decide based on the evidence heard in this case during the past day and a half. The Court would observe that in making a finding as to what is reasonable education many factors must be taken into consideration. It must be taken into consideration the times in which we live and the advances that have been made in the field of education as well as in many other fields such as medicine, technology and engineering, yes, even law, and many other fields of endeavor. The testimony in this case brought out to some extent the type of education, the curriculum, the teachers, the number of pupils per classroom in certain schools in the public schools of DeWitt. The testimony has brought out the number of pupils that have been in attendance in the school or educational program of the respondents and others of the General Assembly and Church of the First Born, and it may very well be that the education that has been provided by this program of instruction, this school, would have provided a reasonable education some years ago. It is a matter of common knowledge that fifty or seventy-five years ago many of our citizens were educated in a one-room school house. We know that many men have gone on to great heights who have been educated in the old one-room school house of years ago. If there are any more one-room public or private schools that are accredited by the State of Arkansas, this Court is not aware of it, but there may very well be some that are accredited by our own State Department of Education. So, what would be a reason-

able education fifty years ago may very well not be considered a reasonable education in the society in which we live in 1965 in the State of Arkansas.

There are many factors that our public and private schools offer today that were not offered forty or fifty years ago. Because of our great public school system that we have, we have courses involving texts in a variety of subjects and that curriculum is rather wide spread and covers an enormous field, and in addition to that you have, as a part of your school curriculum, many other activities not directly connected with studying out of a book. That is, you have your music departments where you bands and your choirs have their activities that are a part of the curriculum of the school for which those members get some credit. You have your athletic department, even though there will be some dissent from some segments of our people that they wish they would abolish the athletic departments. The facts are that we do have athletic departments in our schools — football, basketball, baseball, track. Some schools even have golf. There's not too much of that in the public schools, but certainly the athletic programs form a very definite part, and it is generally conceded that it has a very definite and progressive part to play in the school program in character building and good sportsmanship and other factors that make a good citizen and that, basically, is what our schools are trying to do — turn out good citizens of tomorrow.

Without unduly lengthening this opinion, which is probably too long already, the Court finds that, even though these members of the General Assembly and Church of the First Born are completely sincere in their endeavors, in their beliefs, and if this Court were a member of

that denomination it may very well be that this presiding judge would take the same identical position that they are taking, but that does not change the law that governs what this court must do in this particular case. There is an element of admiration that can be had for these people. Not that involving the violation of a law or laws, but the element that involves their conscience, and it will not be necessary to dwell on that at any length, but be that as it may, they are doing the best that they can to give these children an education.

However, this Court must find, in the basis of the testimony, that it is not a reasonable education as that term was used in the case of *Cude* v. *State*. That being true and it being undisputed that these children are not vaccinated and they are not attending a public, private or parochial school that will afford them a reasonable education, this Court, on the basis of the *Cude* v. *State* case, must find and does find that Roy Mannis is a neglected child and does appoint Mrs. Edna Wheeler, the Probation Officer of Arkansas County, as his temporary guardian for one specific purpose, and the Court's order will read as follows:

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Mrs. Wheeler is appointed temporary guardian of the person of Roy Mannis, and said guardian is authorized and directed to file a petition in the Chancery Court of Arkansas County Southern District, Arkansas, for the purpose of obtaining the physical custody and control of Roy Mannis for the purpose of having said child properly vaccinated and immunized against the disease smallpox, and thereafter enrolled in a public, private or parochial school that will afford to him a reasonable education in

accordance with the laws of this state; the vaccination to be done by a qualified and licensed and practicing physician of this state as soon as is reasonably possible after the guardian to be appointed has taken custody of the said Roy Mannis.

After the immunization of said child, the guardian shall offer, through the office of the Prosecuting Attorney of the 17th Judicial District, Mr. W. M. Lee, to deliver the said child back into the custody of the respondents, and the guardian is to deliver the child back to his natural parents.

In view of the fact that there is no question in this case, no testimony nor evidence in this case indicating that the natural parents will not accept the child back, and that distinguishes this case from the *Cude* Case, there will be no orders entered pertaining to giving the temporary guardian the consent to an adoption. There is absolutely no evidence in the record that once this vacation occurs that these natural parents will not accept this child back. As I say, that does distinguish this case somewhat from the *Cude* case, and in the *Cude* case the trial judge actually had a provision for a consent to an adoption.

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At this time the Court will alter the Court's order to the extent that the Court's order will be superceded and suspended until a decision by the Supreme Court of Arkansas.